Filed 11/20/08 Maddox v. Costco CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SHERYL MADDOX, Plaintiff and Appellant, v. COSTCO WHOLESALE CORPORATION, Defendant and Respondent.	B200218 (Los Angeles County Super. Ct. No. BC351982)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed.

Felahy & Associates and Allen B. Felahy for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Tara Wilcox and Matthew S. McConnell for Defendant and Respondent.

INTRODUCTION

This is an action for violation of the California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq., by appellant and plaintiff Sheryl Maddox against respondent and defendant Costco Wholesale (Costco) and defendant Rod Skinn. Plaintiff alleges that while she was an employee of Costco she was sexually harassed and harassed in connection with her mental disability. She further alleges that defendants wrongfully terminated her employment in retaliation for her complaints about the harassment. The trial court granted defendant Costco's motion for summary judgment. We affirm.

Plaintiff's sexual harassment and mental disability harassment claims are barred because she failed to exhaust her administrative remedies and because she did not timely file an administrative claim. With respect to plaintiff's wrongful termination claims, defendants produced evidence of a legitimate, nonretaliatory reason for plaintiff's termination, namely Costco's finding that plaintiff was responsible for $600 of missing cash. Plaintiff, however, failed to offer admissible evidence showing that Costco's stated reason for termination was pretextual. The trial court thus correctly granted defendants summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Plaintiff's Employment At Costco*

Plaintiff began working at the Costco warehouse in Torrance in September 1998. For the next six years she held a number of non-managerial positions at the warehouse, including cashier and vault clerk. In 2002, plaintiff took a leave of absence due to a mental disability. In connection with this disability, plaintiff was prescribed the medication Prozac. During plaintiff's tenure at Costco, defendant Skinn was the warehouse manager.

2. *Sexual and Mental Disability Harassment of Plaintiff*

Plaintiff's claims stem primarily from three incidents of harassment allegedly committed by Costco employee Rob Vasquez. The first incident took place at the Costco

pharmacy, where Mr. Vasquez worked. As Mr. Vasquez handed plaintiff her prescription Prozac, he said: "This is what crazy people take."

In the second incident, Mr. Vasquez walked into a break room ten feet from plaintiff with his underwear showing through the zipper of his pants. Mr. Vasquez had his hand on his genitals and was "playing with himself."

The third incident occurred in the front end of the warehouse near the cash registers where plaintiff was working. After plaintiff and Mr. Vasquez became involved in a minor altercation, Mr. Vasquez said: "Do you need to take another pill?" Plaintiff testified in her deposition that this was the "last incident" of sexually offensive or inappropriate conduct by Mr. Vasquez. This incident occurred on or before February 2, 2004.

"[I]n between" the three incidents described above, Mr. Vasquez repeatedly burped and farted in plaintiff's presence and called her "bitch" quite a few times. Also, after the second incident but before the third incident Mr. Vasquez called plaintiff and co-worker Michelle Talbott "lesbian lovers."

Plaintiff also alleges that Brandon, a Costco employee, obtained possession of what plaintiff described as "sexy pictures" of plaintiff and Ms. Talbott. Observing a photograph of plaintiff, Brandon said to Ms. Talbott: "Are her boobs real?" Shortly after making this comment, Brandon stopped working at Costco. Plaintiff testified at her August 2006 deposition that this incident occurred "a long time ago, long, long time ago." Plaintiff did not dispute in her opposition to defendant's separate statement of undisputed facts that this incident occurred *before* the three primary incidents involving Mr. Vasquez.

Finally, plaintiff alleges that at a Costco Christmas party her co-worker Mike Celano stated to her: "Your tits are looking good." Plaintiff does not recall when this incident occurred but it is undisputed that the latest it could have occurred was in December 2003.

Plaintiff complained about this harassment to Skinn and other Costco supervisors. Defendants, however, took no remedial action.

3. *Termination of Plaintiff's Employment Due to Alleged Theft*

In 2004, plaintiff began working in the vault at Costco's Torrance warehouse. The vault is the room where cash reserves and financial paper such as checks and credit/debit receipts are stored. Cash, checks and other financial paper are placed in a canister or cylinder (drops) and sent from the cash registers in the front end of the warehouse to the vault through a pneumatic tube system. Cashiers and vault clerks independently keep track of drops by recording detailed information, including the drop number, cash register number, and the content of the drop.

On August 23, 2004, a Costco manager determined that $600 of cash in a drop was missing. Plaintiff and another vault clerk, Leticia Rodriquez, were working in the vault during the evening when drop was made. Costco conducted an investigation of the matter led by regional loss prevention manager Basil Brown. In its two and one-half to three week investigation, Costco management conducted interviews and took statements from employees, including plaintiff. Costco management also reviewed surveillance tape of the cashiers and numerous documents, including logs regarding drops, employee schedules, and employee meal and rest breaks. Costco management also checked to see if a canister or cylinder was stuck in the tube system.

Costco concluded that plaintiff was responsible for the missing $600. This conclusion was based on, inter alia, Costco's determination that (1) the drop appeared to have occurred at a time when Ms. Rodriguez was on a meal break and plaintiff was alone in the vault; (2) the drop appeared to have been sent successfully through the tubes; (3) on the day the $600 was found missing, plaintiff asked Ms. Rodriguez whether there were cameras in the vault (there were none); (4) Ms. Rodriguez was a credible witness because she reported the missing drop, seemed interested and concerned about trying to recover it, seemed cooperative in interviews, and provided details about her actions; (5) plaintiff was less credible than Ms. Rodriguez and other Costco employees interviewed because she seemed uncooperative, unconcerned about the missing money, and guarded, and because she did not provide much detail in response to questions by

Costco management; and (6) Ms. Rodriguez had worked in the vault for more than three years, while plaintiff had worked in the vault for less than three months.

On or about September 25, 2004, Skinn terminated plaintiff's employment with Costco for "proof or confession of dishonesty" and "omitting facts or willfully providing wrong or misleading information." Plaintiff denies that she stole the $600, denies that she failed to cooperative in the investigation, and denies that she provided wrong or misleading information.

4. *Plaintiff's Administrative Claims*

On June 9, 2005, plaintiff filed claims for violation of the FEHA against Costco and Skinn with the California Department of Fair Employment and Housing (DFEH). Plaintiff submitted two identical DFEH forms, one relating to Costco and the other relating to Skinn. The forms contain a list of various types of adverse employment actions a complainant can choose from to describe the factual basis of his or her claim. Plaintiff typed an "X" next to the option "fired" but did not type anything next to the option "harassed." The form also includes a space for the complainant to list the date(s) on which the adverse employment action occurred. Plaintiff stated that the adverse employment action occurred "[o]n September 29, 2004."

Plaintiff alleged that she was fired because of her sex, mental disability, and complaints of sexual harassment. She further stated: "I believe I was terminated because I made complaints about being sexually harassed and about being harassed about my mental disability."

On or about June 13, 2005, DFEH sent letters to plaintiff regarding her claims against Costco and Skinn. The letters stated that because an immediate right-to-sue notice was requested, DFEH was closing the cases against Costco and Skinn, and would not take any further action. The letters served as right-to-sue notices.

5. *Plaintiff's Complaint*

On May 5, 2006, plaintiff commenced this action by filing a complaint against Costco and Skinn in Los Angeles Superior Court. In the complaint, plaintiff set forth six causes of action. In her first and third causes of action, plaintiff alleged that defendants

were liable for sexual harassment and mental disability harassment, respectively, in violation of Government Code section 12940, subdivision (j)(1). In her second and fourth causes of action, plaintiff alleged that defendants were liable for failure to prevent sexual harassment and failure to prevent mental disability harassment, respectively, in violation of Government Code section 12940, subdivision (k).

Plaintiff's fifth cause of action is entitled "Wrongful Termination in Violation of California Government Code §12940." There, plaintiff alleged that "her employment with Defendants was terminated because she refused to tolerate, and ultimately reported, the harassment and hostile work environment created by her co-workers and supervisors at Costco."

Plaintiff's sixth cause of action is entitled "Unlawful Retaliation." There, plaintiff alleged that defendants "unlawfully retaliated against Plaintiff for opposing and reporting the aforementioned harassing and discriminatory acts."

6. *Defendants' Motion for Summary Judgment*

In January 2007, Costco filed a motion for summary judgment, or in the alternative, summary adjudication. Costco and plaintiff submitted briefs, separate statements, evidence and evidentiary objections to support their respective positions. With respect to plaintiff's fifth cause of action for wrongful termination, plaintiff argued, for the first time, that her termination violated California public policies. Specifically, plaintiff alleged that her termination violated (1) the right to privacy, established by article I, sections 1 and 8 of the California Constitution; (2) the right of an employee not to be discriminated against on the basis of her sex, established by Government Code section 12940 et seq.; and (3) the right of an employee not to be coerced by her employer, established by Labor Code section 2861. Plaintiff did not state these allegations in her complaint.

At the hearing on May 1, 2007, the Honorable Teresa Sanchez-Gordon announced from the bench her tentative ruling granting Costco's motion for summary judgment and her rulings regarding evidentiary objections. Judge Sanchez-Gordon also orally stated her reasons for ruling in Costco's favor. With respect to plaintiff's fifth cause of action,

the court stated that its ruling was based on two findings. First, Costco produced evidence that plaintiff was terminated for a nondiscriminatory reason. Plaintiff, however, failed to establish a causal connection between her complaints of harassment and her termination. Second, plaintiff did not state allegations regarding wrongful termination in violation of public policy in her complaint.

Plaintiff orally moved to amend her complaint "according to proof." The court, however, did not expressly rule on the motion. At the conclusion of the hearing, the court granted Costco's motion for summary judgment and ordered defendant to submit a proposed order and judgment.

Costco promptly mailed a proposed order granting summary judgment to plaintiff and filed it with the court. Plaintiff filed objections to the proposed order. On August 2, 2007, the court signed and filed Costco's proposed order and a judgment in Costco's favor. Plaintiff filed a timely appeal.[1]

CONTENTIONS

Plaintiff argues that Costco's motion should have been denied because there are triable issues of material facts with respect to each of her causes of action. Plaintiff also argues that the trial court should have allowed her to amend her pleadings to allege that defendants wrongfully terminated her in violation of public policy. She further argues that the judgment should be reversed because defendants willfully destroyed certain evidence. Finally, plaintiff contends that the judgment should be reversed because the trial court improperly shifted the burden of preparing the formal order granting the summary judgment motion to Costco's counsel.

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[1] Plaintiff's notice of appeal was actually filed *before* the judgment was entered. We deem plaintiff's notice of appeal to have been filed immediately after the filing of the judgment. (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219, fn. 6.)

DISCUSSION

1. *Standard of Review*

A moving party is entitled to summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposing papers *except that to which objections have been made and sustained*." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334, italics added (*Guz*).)

Here, Costco objected to most of plaintiff's evidence. The trial court sustained Costco's objections.~(CT 1859)~ Plaintiff, however, has not presented any argument or citations to authority as to the correctness of the trial court's evidentiary rulings. As a result, "any issues concerning the correctness of the trial court's evidentiary rulings have been waived." (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015 (*Lopez*)) We therefore cannot consider any of the evidence to which trial court sustained objections. (*Guz, supra*, 24 Cal.4th at p. 334; *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 285, fn. 3 (*Lyles*); *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1198 (*Villanueva*).)

2. *Plaintiff Failed to Exhaust Her Administrative Remedies With Respect to Her Harassment Claims*

Under the FEHA, before commencing an action, an employee must exhaust the administrative remedies provided by the statute by filing a complaint with the DFEH and obtaining from the DFEH a notice of right to sue. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492 (*Romano*).) "The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA." (*Ibid*.)

Plaintiff's first four causes of action are for violations of the FEHA based on alleged sexual harassment and mental disability harassment. In her administrative complaint with DFEH, however, plaintiff did *not* assert a claim against defendants based on harassment. Instead, she alleged that she was fired in retaliation for her complaints to

her employer regarding harassment. This is a different claim than harassment. An employee who reasonably complains to her employer about harassment may assert a retaliation claim *even if the underlying harassment complaint was unmeritorious*. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043 (*Yanowitz*).)

Because plaintiff's action pursuant to the FEHA is analogous to a federal Civil Rights Act title VII claim (42 U.S.C. § 2000e et seq.), it may be evaluated under federal law interpreting title VII cases. (*Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 215.) Under title VII, a plaintiff must file a claim with the Equal Employment Opportunity Commission (EEOC) before pursuing a civil rights action in court. "Incidents of discrimination not included in an EEOC charge may not be considered by a federal court unless the new claims are ' "like or reasonably related to the allegations contained in the EEOC charge." ' " (*Green v. Los Angeles Cty. Superintendent of Sch.* (9th Cir. 1989) 883 F.2d 1472, 1475-1476.) An EEOC charge should be "liberally construed" in order to determine whether it is reasonably related to a claim in court. (*Id.* at p. 1476.)

In *Duncan v. Delta Consol. Industries, Inc.* (8th Cir. 2004) 371 F.3d 1020 (*Duncan*), the plaintiff filed an EEOC claim based on "retaliation." The plaintiff alleged in her EEOC complaint that her employer subjected her to different terms and conditions of employment after she reported her supervisor's sexual harassment. In her federal lawsuit, however, the plaintiff asserted title VII claims based on both retaliation and sexual harassment. (*Id.* at pp. 1023-1024.) The court held that plaintiff's sexual harassment claim was not reasonably related to the retaliation charges in her EEOC claim and, on that basis, entered summary judgment in favor of the employer. The court reasoned that the plaintiff's reference to past harassment in her EEOC claim was simply insufficient to put the EEOC on notice of a harassment claim. (*Id.* at pp. 1025-1026.)

The *Duncan* case is directly on point. While we are not bound by *Duncan*, we agree with its reasoning. Like the EEOC in *Duncan*, the DFEH here was not given notice that plaintiff was pursuing a harassment claim against defendants. Furthermore, plaintiff's position is belied by her statement on her DFEH claims that defendants'

alleged misconduct occurred on September 29, 2004. This indicates her claim was based solely on her termination, not on the preceding harassment which allegedly occurred over an extended period of time before she was fired. The trial court correctly granted Costco's summary judgment with respect to plaintiff's first four causes of action because plaintiff failed to exhaust her administrative remedies.

3. *Plaintiff's Harassment Claims Are Time Barred*

Even assuming plaintiff's harassment claims were reasonably related to her DFEH claims, they were not filed in a timely manner. A DFEH claim may not be filed "after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred," with the exception for delayed discovery not relevant here. (Gov. Code, § 12960, subd. (d); *Romano*, *supra*, 14 Cal.4th at p. 492.) In this case, the alleged harassment of plaintiff by Costco employees and defendants' alleged failure to prevent it occurred on or before February 2, 2004. Plaintiff, however, filed her DFEH claims on June 9, 2005, after the one-year limitations period ran. The trial court therefore correctly granted Costco's summary judgment with respect to plaintiff's first four causes of action because plaintiff failed to timely file a DFEH claim.

Plaintiff argues that Rob Vasquez's harassment did not stop on February 2, 2004. Mr. Vasquez, plaintiff alleges, continued to call her "bitch" through August 2004. The only evidence which supports this allegation is a statement in paragraph 5 of plaintiff's declaration filed in support of her opposition to Costco's motion for summary judgment. The trial court, however, sustained Costco's objections to this evidence, and plaintiff has not challenged on appeal the correctness of the trial court's evidentiary ruling. We therefore consider paragraph 5 of plaintiff's declaration to have been properly excluded (*Lopez*, *supra*, 98 Cal.App.4th at pp. 1014-1015), and do not consider this evidence as part of the record we must review. (*Guz*, *supra*, 24 Cal.4th at p. 334; *Lyles*, *supra*, 153 Cal.App.4th at p. 285, fn. 3; *Villanueva*, *supra*, 160 Cal.App.4th at p. 1198.)

Moreover, the allegation in plaintiff's declaration that Mr. Vasquez continued to refer to plaintiff as a "bitch" after February 2, 2004, is clearly contradicted by plaintiff's deposition testimony. Plaintiff cannot create an issue of fact by a declaration which contradicts her prior deposition testimony. (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 860; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21.)

4. *Plaintiff Cannot Show a Casual Link Between Her Harassment Complaint and Her Termination*

In plaintiff's fifth and sixth causes of action, she alleges that defendants wrongfully terminated her in retaliation for her complaints to Costco about harassment.[2] "To establish a prima facie case of retaliation, the plaintiff must show [1] he or she engaged in a 'protected activity,' [2] the employer subjected the employee to an adverse employment action, and [3] a casual link existed between the protected activity and the employer's action." (*McRae v. Department of Corrections &Rehabilitation* (2006) 142 Cal.App.4th 377, 386 (*McRae*).) It is undisputed that plaintiff can show the first two elements of a retaliation claim.[3] The parties contest whether plaintiff can show the third.

At trial, the employee has the burden of showing a prima facie case of retaliation. The employee can satisfy this burden "by producing evidence of nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." (*McRae*, *supra*, 142 Cal.App.4th at p. 388.)

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[2] The trial court found that plaintiff's fifth cause of action should be dismissed because it was duplicative of the sixth cause of action. This was an appropriate ground for dismissing the fifth cause of action. (See *Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1370; see also *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 890.)

[3] Plaintiff's complaint to Costco about harassment was a protected activity. (See Gov. Code, § 12940, subd. (h).) The termination of her employment was an adverse employment action. (See *Yanowitz*, *supra*, 36 Cal.4th at p. 1049.)

An employer moving for summary judgment has the initial burden of showing that the employee cannot establish one or more of the elements of a prima facie retaliation claim. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67 (*Morgan*).) The employer can meet this burden by producing evidence of a legitimate, nonretaliatory reason for the adverse employment action. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1042.) If the employer does so, the presumption of retaliation "drops out of the picture," and the burden shifts back to the employee to prove intentional retaliation. (*Ibid*.)

At this point, to avoid summary judgment, the employee must offer substantial evidence that the employer's proffered justification is a mere pretext. (*Morgan*, *supra*, 88 Cal.App.4th at p. 75; *McRae*, *supra*, 142 Cal.App.4th at p. 388.) The temporal proximity of the protected activity and adverse employment action, "although sufficient to shift the burden to the employer to articulate a nondiscriminatory reason for the adverse employment action does not, without more, suffice also to satisfy the secondary burden borne by the employee to show a triable issue of fact on whether the employer's articulated reason was untrue and pretextual." (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1112.) Furthermore, the employee cannot meet his or her burden by simply showing that the employer's decision was wrong, mistaken or unwise. (*Morgan*, at p. 75; *McRae*, at pp. 388-389.)

Here, defendants produced substantial evidence of a legitimate, nonretaliatory reason for terminating plaintiff's employment. Based on a thorough investigation, defendants concluded that plaintiff had stolen $600. The burden thus shifted to plaintiff to show with competent evidence that defendants' justification for firing her was merely a pretext, and that they instead fired her in retaliation for her complaints about harassment.

Plaintiff did not meet her burden. As purported proof of defendants' retaliatory motive, plaintiff relied on Exhibits 7 (Costco employment agreement), 10 (memo of Mike Celano), 11 (unedited rough draft of Basil Brown's deposition transcript), 13 (statement of Sylvia Marquez) 14 (statement of Abel Chavez), and 16 (computerized time log) of a

multi-volume document (Compendium) entitled "Plaintiff's Evidence Submitted in Support of Her Opposition to Defendant's Motion for Summary Judgment/Adjudication." Exhibit 1 of the Compendium consists of the declaration by plaintiff's counsel, Allen B. Felahy. Mr. Felahy states that Exhibits 7, 10, 13, 14 and 16 were documents produced by Costco in response to plaintiff's First Set of Requests for Production. Mr. Felahy, however, does not attach the actual discovery requests propounded by plaintiff nor Costco's responses thereto.

Defendants objected to Mr. Felahy's declaration on several grounds, including that Mr. Felahy lacked personal knowledge of the attached documents and did not establish a foundation to authenticate them. The court sustained these objections. Plaintiff, however, has not challenged the trial court's evidentiary rulings on appeal. We therefore cannot consider Exhibits 7, 10, 11, 13, 14 and 16 as part of the record. (*Lopez*, *supra*, 98 Cal.App.4th at p. 1014-1015; *Lyles*, *supra*, 153 Cal.App.4th at p. 285, fn. 3; *Villanueva*, *supra*, 160 Cal.App.4th at p. 1198.; *Guz*, *supra*, 24 Cal.4th at p. 334.)

Even if we did consider Exhibits 7, 10, 11, 13, 14 and 16 de novo, we would affirm the trial court's ruling sustaining Costco's evidentiary objections to these documents. With respect to Exhibits 7, 10, 13, 14 and 16, plaintiff presented no evidence of who created the documents, when they were created, or for what purpose they were created. We know nothing about the documents other than they were produced by Costco in response to unspecified document requests. This is not enough to authenticate the documents. (Evid. Code, §§ 1400, 1401.) Likewise, the unedited rough draft of Basil Brown's deposition transcript (Exhibit 11) is not authenticated (Evid. Code, §§ 1400, 1401) and may not be cited as evidence by plaintiff. (Code Civ. Proc., § 2025.540, subd. (b).)

Finally, even if the evidence submitted by plaintiff were admissible, we would still affirm the trial court's order with respect to plaintiff's fifth and sixth causes of action. Plaintiff's evidence at best supports a colorable claim that defendants incorrectly concluded that plaintiff stole $600. This is not enough to raise a triable issue of material

fact. (*Morgan, supra*, 88 Cal.App.4th at p. 75; *McRae, supra*, 142 Cal.App.4th at pp. 388-389.)

5. *The Trial Court Did Not Abuse Its Discretion in Denying Plaintiff's Oral Motion for Leave to Amend Her Complaint*

Plaintiff did *not* plead a cause of action for wrongful termination in violation of public policy. At the hearing on Costco's motion for summary judgment, plaintiff orally moved for leave to amend her complaint to assert such a cause of action. Plaintiff argues that the trial court's denial of that motion was reversible error. We disagree. In a motion for summary judgment, the issues are framed by the pleadings. (*Lachtman v. Regents of University of California* (2007) 158 Cal.App.4th 187, 197.) "A party cannot successfully resist summary judgment on a theory not pleaded." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541.)

Plaintiff's reliance on *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059 is misplaced. In *Kirby*, the defendant's motion for summary judgment was unsupported by declarations or other evidentiary material, and thus "functioned more like a challenge to the sufficiency of the pleadings." (*Id.* at p. 1067.) Here, by contrast, Costco's motion was based on declarations and other evidentiary material. In her opposition to the motion, plaintiff raised new and different legal theories. Costco's motion therefore does not function as a challenge to the sufficiency of the pleadings. Rather, Costco's motion is based on the ground that there is no merit to plaintiff's causes of action as framed by the pleadings.

6. *Costco's Alleged Destruction of Evidence is Not Grounds for Reversal of the Judgment*

Plaintiff argues that Costco "willfully destroyed" Basil Brown's notes regarding his investigation of the missing $600. The trial court, plaintiff contends, should have assumed that the notes would have been unfavorable and, on that basis, denied Costco's motion for summary judgment.

The only evidence plaintiff cites to support her argument is the unedited rough draft of Mr. Brown's deposition transcript. As explained above, however, that transcript

is inadmissible. Moreover, the cited portion of Mr. Brown's deposition transcript does not support plaintiff's claim that Costco "willfully destroyed" evidence. Rather, Mr. Brown merely testified that he was unable to find the notes he took after looking for them.

7. *The Trial Court's Order Requiring Defendants to Submit a Proposed Order Was Proper and Not Grounds for Reversal of the Judgment*

Plaintiff argues that "[t]he trial court erred when it improperly shifted the burden of preparing the formal order granting the summary judgment motion to [Costco's] counsel without providing the requisite findings." This alleged error, plaintiff contends, is grounds for reversal of the judgment against plaintiff.

Plaintiff relies on *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688 (*Carnes*). In *Carnes*, the trial court did not make a tentative ruling before or at the hearing on a motion for summary judgment and conceded that it had only " 'sort of scanned' " the papers. (*Id.* at p. 691.) Two weeks later, the trial court issued a ruling granting the motion and ordering the defendant to prepare a formal order. (*Ibid*.)

The plaintiff argued that it was improper for the trial court to sign the defendant's formal order without alteration. In addressing the issue, the court of appeal cited with approval *Tera Pharmaceuticals, Inc. v. Superior Court* (1985) 170 Cal.App.3d 530, which held that a trial court could order counsel to prepare formal orders granting motions for summary judgment. (*Carnes*, *supra*, 126 Cal.App.4th at p. 692.) The court, however, stated: "Although we agree that *Tera Pharmaceuticals* approves (appropriately) of shifting to counsel the burden of preparing a formal order on a motion for summary judgment, we do not read that case as sanctioning, nor do we sanction, the total abdication of judicial responsibility that occurred here: to wit, granting a summary judgment motion without *any* specification of the reasons for doing so, then directing counsel for the prevailing party to prepare an order 'include[ing] and [*sic*] all findings necessary to support th[e] order,' without telling the prevailing party what any of those 'findings' should be." (*Ibid.*)

Notwithstanding its disapproval of the process by which the trial court made its order, the court held that the "process does not compel reversing the judgment." (*Carnes, supra,* 126 Cal.App.4th at p. 693.) By signing the prepared order, the trial court satisfied the requirements of Code of Civil Procedure section 437c, subdivision (g), which provides that when a trial court grants a motion for summary judgment, it shall state the "reasons for its determination." (*Carnes,* at p. 693.)

The present case is factually distinguishable from *Carnes*. The trial court did not abdicate its judicial responsibility because it articulated at the hearing its tentative ruling and the reasons for its tentative ruling. Moreover, we agree with *Carnes* that a trial court's order requiring a prevailing party to draft a proposed order granting summary judgment, even when improper, is not by itself grounds for reversal of judgment. We have reviewed the motion de novo and find, for the reasons stated herein, that the motion was properly granted.

DISPOSITION

The judgment is affirmed. Costco is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.